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Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

October Term, 1970.

No. 89.

ALTON J. LEMON, PRISCILLA REARDON, BETTY J WORRELL, and PENNSYLVANIA STATE EDUCATION ASSOCIATION, PENNSYLVANIA CONFERENCE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA COUNCIL OF CHURCHES, PENNSYLVANIA JEWISH COMMUNITY RELATIONS CONFERENCE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, INC.,
Plaintiffs-Appellants,

v.

DAVID H. KURTZMAN, as Superintendent of Public Instruction of the Commonwealth of Pennsylvania, GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania, ST ANTHONY'S ROMAN CATHOLIC CHURCH SCHOOL, ARCHBISHOP WOODS GIRLS HIGH SCHOOL, UKRAINIAN CATHOLIC SCHOOL, GERMANTOWN LUTHERAN ACADEMY, AKIBA HEBREW ACADEMY, PHILADELPHIA MONTGOMERY CHRISTIAN ACADEMY, and BETH JACOB SCHOOLS OF PHILADELPHIA,
Defendants-Appellees,

and

PENNSYLVANIA ASSOCIATION OF INDEPENDENT SCHOOLS,
Intervenor-Defendant-Appellee.

On Appeal from a District Court of Three Judges for the Eastern District of Pennsylvania.

BRIEF OF CITY OF PHILADELPHIA, AMICUS CURIAE.

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Huntzinger Printing Corp., *Appellate Printers,* Camden, N. J.

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INTEREST OF THE AMICUS.

The City of Philadelphia, amicus curiae, is a political subdivision of the Commonwealth of Pennsylvania, being a city of the first class functioning under a Home Rule Charter, and having a population of approximately two million persons, of whom approximately 280,000 are enrolled as students in the public schools of the local, coterminous School District of Philadelphia, and approximately 160,000 are enrolled as students in local nonpublic schools.

The City of Philadelphia is interested in the welfare of all of its citizens, including all of the children who attend all of the schools, both public and nonpublic, and all of the taxpayers who support, by their taxes and by their voluntary contributions, all of these schools.

The City is of the opinion that the welfare of all of its citizens demands that every child shall be able to receive a quality secular education, and that no child shall be deprived of the opportunity for such secular education by reason of the fact that he or his parents shall have chosen to seek the same in a school other than the public schools or be forced, by financial pressures, to give up that choice in order to seek aid in the public schools.

The City is aware of the financial crisis facing elementary and secondary education, public and nonpublic, in the Philadelphia School District, in the Commonwealth of Pennsylvania and in the nation, as a result of the rapidly mounting costs occasioned by the rising school population, the pressures of inflation, and the competing demands for tax funds which arise from the ever increasing noneducational needs of the same communities.

It is particularly aware of the fact that nonpublic education is bearing the burden of educating more than 20% of the school children in the Commonwealth and more than one-third of the school children within its own borders; that, as a result of the financial crisis facing all schools today, there is a serious danger that many nonpublic schools will be forced to close their doors, with the result that many students will be forced to transfer to the already hard-pressed public schools, depriving them and their parents of

a fundamental liberty, and imposing upon the public schools and upon the taxpayers of the City an intolerable burden, both financially and in terms of quality education.

In the face of this exceedingly serious threat to the freedom of, and the quality of education available to, its people, and to the ability of the taxpayers to meet the mounting demands of the numerous problems of a metropolitan center, the City is appreciative of the efforts of the Legislature of the Commonwealth to reduce the public hazards inherent in this crisis and to provide for the continued secular education of all of the children of the Commonwealth, through the purchase of secular educational services from the non-public schools in the City and throughout the State.

It is because the City believes that the statute under attack in this case is an invaluable aid to the education in secular subjects of all of the children in all of the schools, as well as a very substantial contribution to the general economic health of the community; that it is designed to do so in a manner calculated to protect the religious freedom of the people; and that the attack launched upon the law by the appellants and others is not only ill-conceived, but will, if successful, work a great injustice and very serious hardship upon all the people of the community; that the City of Philadelphia* is submitting this brief *amicus curiae*.

THE NATURE OF THE DISPUTE.

Although the appellants and their supporting *amici curiae*, make much of the alleged error on the part of the District Court in deciding the matter on a motion to dismiss, thus depriving appellants of an opportunity to present testimony, an examination of their arguments reveals that the question before the Court was and is founded upon several conclusions of law.

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* See letter of Hon. James H. J. Tate, Mayor of Philadelphia, to Mr. William D. Valente, President, Board of Education; Archdiocese of Philadelphia, dated July 14, 1970; attached as an Addendum to this Brief.

The fundamental position of the appellants is really this: that the purchase of secular educational service provided for in the statute is not a purchase at all, but a mere subterfuge, designed to disguise a subsidy which is being made by the Commonwealth for the purpose of giving aid to religion, and particularly to one religious group, contrary to the provisions of the Establishment Clause and of the Free Exercise of Religion Clause of the First Amendment to the United States Constitution.

In order to buttress this view, appellants seek to show that the Commonwealth receives nothing of value in return for the payments made (brief, p. 10), arguing that, since the recipients of funds rendered no *additional* services "because the schools do not undertake any obligation whatsoever to educate any particular students or any additional students at all" (brief, p. 14), there is no contract. This is the same argument which was made by the dissenting judge, below. The trouble with this argument is that it assumes that there can be no contract without a mutual exchange of promises, thus ignoring the unilateral contract in which one party promises to pay the other in exchange, not for a promise, but upon the actual performance of the act.[1] Such contracts by their nature create no obligation at the inception, but involve a promise by promisor to perform something in the future provided the promisee performs a specified act. Upon performance, however, the contract matures and the original promise is capable of enforcement.

The second legal conclusion which lies at the foundation of appellants' attack is their utter inability to conceive, or at least to accept, either the possibility or the desirability of the coexistence of two purposes or goals in a sectarian institution. As they see the matter, a sectarian purpose completely overshadows any possible secular purpose that might be said to exist in such an institution. To them a church related school is not a school; it is a church, and,

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[1] See Words and Phrases, Vol. 43, pp. 465-67, Unilateral Contract, citing many instances involving such contracts.

consequently, any aid to this institution is by necessity an aid to a church.

Closely related to this conceptual difficulty is the tendency of appellants, and others of a similar mind, to consider the Establishment Clause of the First Amendment as an absolute prohibition of any accommodation on the part of the state. It is this absolutist tendency which has driven them to attack numerous arrangements whereby the State has accommodated and even encouraged religion. These arrangements, all of which have been upheld by this Court despite earnest efforts by the protagonists of "absolute separation", include released time[2]; the use of state supplied textbooks in church-related schools[3]; bus transportation at public expense for children attending church-related schools[4]; and tax exemption for church property.[5]

The present case has already produced very lengthy briefs submitted by the parties in the Court below as well as a substantially voluminous brief by the appellants filed in this Court. Doubtless the appellees will produce a similar document. Under the circumstances and in view of the press of time your *amicus* sees no necessity for it to thread its way through the long history of the various church-state decisions of this Court. As this Court declared in its most recent pronouncement on the subject:

> "The Establishment and Free Exercise Clauses of the First Amendment are not the most precisely drawn portions of the Constitution. The sweep of the absolute prohibitions in the Religion Clauses may have been calculated; but the purpose was to state an objective, not to write a statute. In attempting to articulate the scope of the two Religious Clauses, the Court's opinions reflect the limitations inherent in formulating gen-

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[2] **Zorach v. Clauson,** 343 U. S. 306 (1952).

[3] **Board of Education v. Allen,** 392 U. S. 236 (1968).

[4] **Everson v. Board of Education,** 330 U. S. 1 (1946).

[5] **Walz v. Tax Commission of the City of New York, No. 135,** October Term, 1969 (May 4, 1970), 38 L. W. 4347.

eral principles on a case-by-case basis. The considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may have been too sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles" (*Walz*, supra, at p. 4348).

For the purposes of this brief then, the City of Philadelphia, *amicus curiae*, will confine its argument to pointing out certain errors in legal principle with particular emphasis on the question of whether or not there exists a valid secular purpose which would justify the expenditure of public funds pursuant to the statute here under attack. It will also present to the Court pertinent argument concerning the public benefits which accrue to the people of Philadelphia as a result of the statute.

SUMMARY OF ARGUMENT.

The statute under discussion is, on its face, a legitimate exercise of the legislative authority to provide for education of the children of the Commonwealth, in the face of a financial crisis which threatens to force the closing of numerous nonpublic schools presently educating more than 20% of the State's children, by supplying funds for the purchase of secular education, in the form of classes in mathematics, physical sciences, modern foreign languages and physical education, from those schools, whether they be sectarian or nonsectarian in their organization and control.

The legislative plan is not a subterfuge, designed to disguise a subsidy to religion, but a true contract providing for reimbursement for actual audited expenditures made by the schools for secular subject instruction.

The purpose of the legislature is secular in nature and this is not changed by the fact that the schools and teachers

may, and usually do, have an additional, religious, mot for providing such secular instruction.

The argument of appellants to the contrary stems fr their unwillingness to accept a reasonable balance betwe the two Religion Clauses in the Constitution, and the insistence upon an "absolute separation" of church a state.

This "absolute separation" concept is not the true mea ing of the Constitution, but rather, the test is a secular pu pose and a neutral primary effect, without excessive e tanglement of the church in the affairs of the state, a vice versa.

The Pennsylvania statute, by securing the secular legi lative purpose of education, while respecting the religiou freedom of parents who desire to send their children t religious schools, meets these tests.

The public benefits which flow from the legislative pla are enormous, not only in terms of vast financial savings fr the taxpayers, but also in terms of the protection of re ligious liberty and educational freedom, and the con comitant values of diversity and competition, and the avoid ance of a governmental monopoly in education.

And finally, the avoidance of the intolerable tax burden which would otherwise impend, will permit the continua tion and expansion of expensive but vital municipal ser vices, especially those health and welfare programs which particularly aid the poor and the disadvantaged, and which depend for their financing upon the same taxpayers wh must bear the costs of public education.

There is no charge of intentional racial segregation and such *de facto* segregation as may exist is more likely to be mitigated by the approval of the statute than by its disapproval.

ARGUMENT.

The Statute Under Discussion.

The statute[6], which has been attacked in this case as unconstitutional, was well summarized by the Court below, which referred to it as "the Education Act", in the following language:

> "The Education Act was signed into law by the Governor of Pennsylvania on June 19, 1968. The Act empowers the State Superintendent of Public Instruction to contract for the purchase of 'secular educational services' from nonpublic schools located in the Commonwealth of Pennsylvania which fulfill the compulsory school attendance requirements under Pennsylvania law.
>
> "In its legislative findings and declaration of policy the Pennsylvania Legislature has determined that a crisis exists in elementary and secondary education in Pennsylvania due to rapid increases in costs and school population and consequent demands for more teachers and facilities. It was also found that twenty per cent of all elementary and secondary school children in Pennsylvania fulfill the requirements of the Commonwealth's compulsory school attendance laws in nonpublic schools. It has been further recognized that elementary and secondary education constitutes a public welfare purpose and that nonpublic education, by providing instruction in secular subjects, contributes significantly to the achievement of this public purpose. The Legislature, therefore, concluded that it is a governmental duty to support the achievement of this pub-

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[6] Nonpublic Elementary and Secondary Education Act, 24 P. S. §5601 et seq. (Supp. 1969). The complete text of the statute appears in Appendix A to the opinion of the Court below, 310 F. Supp. 35 at pp. 55-58.

lice welfare purpose by supporting the purely secular objectives of nonpublic education.

"Briefly, the operational scheme of the statute permits the Superintendent of Public Instruction to enter into contracts with nonpublic schools, whether sectarian or nonsectarian, for the purchase of 'secular educational services'. These 'secular educational services' are defined to mean 'providing of instruction in a secular subject', while secular subject is defined as 'any course which is presented in the curricula of the public schools of the Commonwealth and shall not include any subject matter expressing religious teaching, or the morals or forms of worship of any sect'. All purchases of secular educational services under the Education Act are to be at the 'actual cost' of three items of such service: teacher salaries, textbooks and instructional materials. The Education Act further limits all purchases of secular educational services to courses in mathematics, modern foreign languages, physical science, and physical education. As a condition for payment under the Act, the Superintendent of Public Instruction must approve all textbooks and instructional materials employed in the instruction rendered. In addition, a satisfactory level of student performance in standardized tests must have been attained and within five years of the date of the Act all secular educational services for which reimbursement is sought must be rendered by teachers holding State certification equal to the standard for teachers in public schools.

"Payment under the Act in discharge of the contractual obligation may be made only after service has been rendered. Section 5607(a) provides in relevant part that:

> 'Any nonpublic school seeking such reimbursement shall maintain such accounting procedures, including maintenance of separate funds and accounts pertaining to the cost of secular educational service, as to establish that it actually expended in support

of such service an amount of money equal to the amount of money sought in reimbursement. Such accounts shall be subject to audit by the Auditor General.'

"Funds for the operation and administration of the Education Act are to be drawn only from the nonpublic elementary and secondary education fund. The monies comprising this fund are to be taken exclusively from the proceeds of State horse racing and harness racing.

"Defendants, in their brief, have informed the Court that 1181 nonpublic elementary and secondary schools in Pennsylvania, having a total pupil population of 535,215 children, and located in 55 of Pennsylvania's 67 counties, are now under contract with the Commonwealth pursuant to the Education Act. One year's performance under contract has now been rendered, and, on September 2, 1969, the Commonwealth paid its first quarterly installment obligation."

Thus, the Act, on its face, spells out an obviously secular purpose, the primary effect of which neither advances nor hinders religion. The Court, in a two to one decision, so found.

I. APPELLANTS MISCONTRUE THE STATUTE.

Appellants, however, and the dissenting Judge, do not accept the legislative findings and declaration of purpose at face value. Instead, they purport to see in the Act a subterfuge,[7] a mere label, designed to create the impression that the state is purchasing secular educational services, when, in fact, there is no real contract, the state receives no benefit in return for its funds, and the real intention of the legislators "as revealed by the official legislative his-

[7] Brief for Appellants, p. 14.

tory, was to alleviate an alleged financial crisis of the Catholic[8] parochial school system and *thus to aid religion*". (Emphasis supplied.) The phrase "thus to aid religion" is, of course, a conclusion of the appellants, and is not contained in the legislative history, a short version of which appellants have set forth in the addendum to their brief.

A. The Legislative Purpose is to Ensure the Continuation of the Teaching of Secular Subjects in Nonpublic Schools.

There is no doubt that the legislators intended to alleviate the financial crisis in the nonpublic schools. This is clear, not only from the legislative history but is set forth quite plainly in the legislative findings in the Act itself.[9]

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[8] Brief for Appellants, p. 10.

[9] See §2 of the Act, 24 P. S. 5602 in which the Legislature found "(1) that a crisis in elementary and secondary education existed in the Nation and in the Commonwealth . . . (2) that nonpublic education . . . bears the burden of educating more than 20% of all elementary and secondary school pupils in Pennsylvania . . . (3) that elementary and secondary education is . . . a public welfare purpose [to which] nonpublic education, through providing instruction in secular subjects, makes an important contribution; that the governmental duty to support [such] purposes . . . may be in part fulfilled through . . . support of those purely secular educational objectives achieved through nonpublic education; (4) that freedom to choose nonpublic education, meeting reasonable state standards, for a child is a fundamental parental liberty and a basic right; (5) that the Commonwealth . . . [may] enter into contracts for the purchase of needed services with persons or institutions whether public or nonpublic, sectarian or nonsectarian; (6) that should a majority of parents of present nonpublic school population desire to remove their children to the public schools of the Commonwealth, an intolerable added financial burden to the public would result, as well as school stoppages and long term derangement and impairment of education in Pennsylvania; that such hazard to the education of children may be substantially reduced and all education of the Commonwealth improved through the purchase herein provided of secular educational services from Pennsylvania nonpublic schools."

It does not follow, however, that the primary purpose of the legislators was merely to alleviate a financial crisis without any reason. The whole point of the matter was that, due to the financial crisis there was a serious danger that many of these schools would close, forcing the parents to send their children in large numbers to the public schools, thus creating the "intolerable added financial burden to the public . . . as well as . . . long term . . . impairment of education", which was referred to in the Act (24 P. S. 5602(6)). It is the elimination of this hazard,[10] i.e., the danger of loss of the numerous nonpublic schools which carry such a large share of the burden of supplying secular education to the children of Pennsylvania, which constitutes the essential purpose of the Act.[11] It is hard to see how a purpose so plainly stated can justly be called a subterfuge.

B. Legislative Plan is Not a Subterfuge.

The difficulty of the appellants in this regard stems from their refusal or inability to recognize (a) that the hazard exists;[12] and (b) that the Commonwealth has, in fact, received a substantial benefit.

The essence of their position is set forth in their brief as follows:[13]

> "The majority below adopted the contention of the defendants in their brief below that under Act 109 there was a '*quid pro quo* exchange, pursuant to contract . . .' The majority accepted the facade of the face of the Act that what the statute authorized was for

[10] See discussion infra at p. 12, et seq.

[11] Ibid.

[12] Appellants, in their memorandum of law below, deny that there is in fact any trend toward the closing of nonpublic schools. But see discussion infra at p. 28, et seq.

[13] Brief for Appellants, p. 31.

'the Superintendent of Public Instruction to enter into contracts.' They speak of the payment made to the schools under Act 109 as being 'in discharge of contractual obligations,' which 'may be made only after the service has been rendered' (App. A82). Chief Judge Hastie's dissenting opinion rejected this conclusion of fact and found that there was no 'contract' in any proper sense of the word since the schools were not obligating themselves 'to do anything for or in the interest of the state.' The state buys no services and the school sells none. The artificial characterization of this procedure as 'contracting for secular educational services' does not help our constitutional problem" (App. A102).

"What the dissenting judge rightly perceived from the face of the Act appellants offered to prove as a matter of fact, after discovery, i.e., that the Commonwealth of Pennsylvania, which paid the schools, commencing in September, 1969, for 'educational services rendered in the preceding academic year', in fact received nothing. Appellants offered to prove that no children were being educated by the recipient schools that had not been previously educated by them prior to the subsidy; that indeed there was no change in the educational status quo whatsoever except for the transfer of a sum of money from the state to the nonpublic schools."

It is clear from the language quoted above that appellants and the dissenting judge are overlooking or ignoring the fact that the object to be achieved, and the consideration for the Commonwealth's agreement to pay, is not a change in the *status quo,* but rather a prevention of a change which, if it were to occur, would wreak serious damage to the education of many of the students, in both public and nonpublic schools, in the Commonwealth. This is the secular legislative purpose as well as the primary effect of the Act. When the appellants argue that the object of the Act is

to aid the nonpublic schools, they have no real quarrel with supporters of the Act. The dispute arises concerning the *reason* for the aid, that is, whether it is to achieve a secular purpose by enabling the institutions to continue[14] to provide education in the secular subjects, or whether it is merely to aid religion. The Pennsylvania Legislature has declared it to be the former and the majority of the Court below accepted the *bona fides* of that declaration. A contrary finding should be grounded upon something more substantial than the mere reasoning process indulged in by the appellants. The alleged subterfuge is in fact a statement in plain language without any effort to deceive. Indeed, though the appellants find the majority of the Court below ingenuous[15] for thus accepting the legislative findings at face value, nothing in their argument gives any substance to the charge of subterfuge.

C. Statutory Payments are Not a Subsidy for Unrestricted Use of Schools—But Reimbursement for Actual Cost of Specified Secular Subjects.

Having reached the conclusion that no contract existed and that the state had received nothing of value in return for its funds, appellants naturally concluded that the pay-

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[14] In addition to their argument that schools do not agree to provide any additional service, counsel for the **amici curiae** also argue that the state had no need to purchase the service since it could compel schools to render this service as a matter of law. (See the brief of **amici curiae**, p. 12.) This, however, is not correct since the power of the State to impose such requirements is merely the power to set forth the conditions which must be present in order that attendance at a given school may be held to be sufficient to satisfy the state's compulsory attendance laws. (See **Board of Education v. Allen**, supra, at pp. 245, 246.) There is, of course, no power in the states to compel private schools to remain open, particularly where financial difficulties render such a course impossible.

[15] Brief for appellants, p. 28.

ments authorized by the Act amounted to a simple subsi
and thus argued that

> "Any such payment from the Treasurer of the Com
> monwealth to the treasuries of sectarian church-affil
> ated schools for their unrestricted use was a violation
> of the establishment clause, per se, under the rule of
> *Everson v. Board of Education,* 330 U. S. 1 (1946), for
> bidding any tax aid 'to support any religious activities
> or institutions'."[16]

The funds, however, are not in support of any religious ac
tivities nor do they amount to support of the institution
being merely reimbursement for sums actually spent for the
secular education and restricted to that purpose by the
terms of the statute including the provision for audit by
the Commonwealth.

It is the sectarian nature of the institutions "controlled by
churches, having as their purpose the teaching and propaga
tion of a particular religious faith, and conducting their
operations, curriculums and progress to fulfill that pur
pose",[17] which, in the view of appellants and the *amici*, is
fatal to the statutory scheme. As they see it, all activities
of such institutions are religious and consequently all such
activities are beyond the power of the state to finance. As
the *amici* said,[18]

> "We find it difficult to believe that no matter what
> test for constitutionality under the Establishment
> Clause is applied, a statute which allows public funds
> to be used to finance even secular instruction *in such*
> *institutions* can be upheld." (Emphasis supplied.)

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[16] Appellants' brief, p. 9.

[17] Brief for appellants, p. 8; Brief of **amici curiae,** p. 9.

[18] Brief, p. 9.

D. Purpose of Religious Organizations Distinguished from Purpose of Legislators.

The point here is that the opponents of the statute make no distinction between the purpose of the religious organizations which operate the schools and the purpose of the legislators in enacting the statute. Although the primary purpose of the Commonwealth is secular, the primary motive which moves members of the religious organizations to undertake this secular activity may be, and ordinarily is, religious. The same dilemma faced the appellants in *Allen* where this Court declared:

> "The major reason offered by appellants for distinguishing free textbooks from free bus fares is that books, but not buses, are critical to the teaching process, and in a sectarian school that process is employed to teach religion. However, *this Court has long recognized that religious schools pursue two goals, religious instruction and secular education* (citing *Pierce v. Society of Sisters*, 268 U. S. 510 (1925) . . . a premise of this *(Pierce)* holding was the view that the *State's interest in education would be served sufficiently by reliance on the secular teaching that accompanied religious training* in the schools maintained by the Society of Sisters."[19] (Emphasis supplied.)

It is submitted that the present statutory scheme provides for true contracts for the purchase, at cost, of secular educational services, and that neither the legislative purpose nor the primary effect is to advance or to hinder religion.

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[19] **Allen**, supra, at p. 245.

II. APPELLANTS MISUNDERSTAND THE FIRST AMENDMENT.

The deep suspicion with which the appellants view the declared intention of the Legislature concerning their purpose is grounded not upon any showing of deceit on the part of the solons,[20] but rather upon a misapprehension on the part of the appellants with respect to the principles of law which govern this case, and particularly the meaning of the Religion Clauses in the First Amendment to the United States Constitution.

A. The Constitution Does Not Require Absolute Separation —Religious and Secular Purposes Can Coexist.

To put the matter concisely, the appellants believe in a fundamental principle of "absolute separation"[21]; which leaves no room for that accommodation which this Court found to be "the common sense of the matter".[22]

> "The First Amendment . . . does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency, one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly . . . We are a religious people whose institutions presuppose a Supreme Being . . . when the state encourages religious instruction or

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[20] Although, there having been no trial below, no evidence was submitted, nevertheless, appellants argue that their proof lies in the legislative history (brief, p. 10). An examination of that history, however (appendix to appellants' brief), reveals nothing to indicate subterfuge or deceit. See discussion, supra.

[21] Brief for Appellants, p. 41, footnote 17.

[22] **Zorach v. Clauson,** supra, at pp. 312-314.

cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For then it respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. We would be preferring those who believe in no religion over those who do believe."

The above language has been cited with approval by this Court on several occasions, the latest being in the very recent case of *Walz v. Tax Commission,* supra, where this Court said:

"The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other." [citing Zorach, as above.][23]

Those who cling to the absolute, however, find it difficult to conceive of the possibility, or at least of the desirability of recognizing, that a church-related school might have, not one purpose, a religious one, but rather two purposes, the one religious and the other secular.[24] To the absolute separationist, the two are one and the one is religious.

In *Allen,* supra, this Court rejected this rigid approach and upheld a New York law which made textbooks available to pupils in parochial schools. In so doing this Court cited both *Pierce,* supra, and *Cochran v. Louisiana State Board of Education*[25] as examples of cases upholding the reliance upon church-related schools to provide secular aspects of education in which the state had an interest. Thus, referring to *Pierce,* supra, this Court said:

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[23] 38 L. W. 4347, at 4348.

[24] **Board of Education v. Allen,** supra, at p. 245.

[25] 281 U. S. 370 (1930).

> "Oregon had not shown that its interest in secular education required that all children attend publicly operated schools. A premise of this holding was the view that the State's interest in education would be served sufficiently by reliance on the secular teaching that accompanied religious training in the schools maintained by the Society of Sisters."[26]

Indeed, this Court recognized that under *Pierce* the state not only could but "must" satisfy its interest in secular education through the instrument of private schools. Referring to numerous cases upholding a state's authority to create reasonable standards for education in such institutions, this Court said:

> "These cases were a sensible corollary of *Pierce v. Society of Sisters*: if the state must satisfy its interest in secular education through the instrument of private schools it has a proper interest in the manner in which those schools perform their secular education function."[27]

The Court then went on to refer to *Cochran*, supra, as another corollary, in which the supplying of school books by the state to children in both public and private schools was upheld as a public purpose. The *Allen* Court then set forth the underlying principle which justifies encouragement by the State of private school systems including the church-related ones, in the following language:

> "Underlying these cases, and underlying also the legislative judgments that have preceded the court decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience. Americans care about the quality of the secular education available to their children. They have considered high quality education to be an indispensable ingredient for achieving the kind

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[26] **Allen**, supra, p. 245.

[27] **Ibid**, p. 247.

of nation, and the kind of citizenry, that they have desired to create. Considering this attitude, the continued willingness to rely on private school systems, including parochial systems, strongly suggests that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students. This judgment is further evidence that parochial schools are performing, in addition to their sectarian function, the task of secular education."[28]

In the matter at bar a wide segment of public opinion in the Commonwealth of Pennsylvania, legislative and otherwise, as reflected in the Act of 1968, has found that the nonpublic schools do an acceptable job of providing secular education to their students. There appears to be no reason why, if the state may rely upon these schools to perform the secular function, the state cannot provide the necessary funds to see that the secular function will be continued.

The idea that state payments in reimbursement of costs incurred by a sectarian institution to provide welfare services to children, are not subsidies in support of religion, but payment of just debts, was recognized in *Schade v. Allegheny County Institution District*[29], where the Pennsylvania Supreme Court upheld payments to a Baptist orphanage for the support of delinquent children, against attacks founded, inter alia, on the Establishment Clause. Citing *Everson* and *Cochran*, supra, the Court said:

"The cost of the maintenance of neglected children either by the State or the County is neither a charity nor a benevolence, but a governmental duty. All the plaintiffs proved was that the monies received by the defendant institutions were in partial reimbursement for the cost of room and board of such minors. The services had been rendered before partial payment on account of same was received. A considerable part

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[28] Ibid. pp. 247-48.

[29] 386 Pa. 507 (1956).

of this money is recouped by the Juvenile Court from the parents of these minor wards. The balance of the funds so expended are, in legal effect, payments to the child,—— not the institution supporting and maintaining him or her. [case cited] . . .

"The Constitution does not prohibit the State or any of its agencies from doing business with denominational or sectarian institutions, nor from paying just debts to them when incurred at its direction or with its approval. Numerous cases can be readily visualized where such situations have occurred: i.e., payment of the bill of an injured employee to a sectarian hospital."[30]

This Court had reason, even more recently than in *Allen*, to reiterate the appropriate general principle applicable to church-state questions when it declined, in *Walz v. Tax Commission*, supra, to strike down property tax exemptions enjoyed by religious organizations for religious properties, which exemptions were attacked as violative of the First Amendment. In delivering the opinion of the Court, Mr. Chief Justice Burger discussed the Establishment and Free Exercise clauses of the First Amendment warning against the danger of "too sweeping utterances" and the rigidity which "could well defeat the basic purpose of these provisions":

"The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of these expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist

[30] **Ibid.** at p. 512.

without sponsorship and without interference.

"Each value judgment under the Religion Clauses must therefore turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so. Adherence to the policy of neutrality that derives from an accommodation of the Establishment and Free Exercise Clauses has prevented the kind of involvement that would tip the balance toward government control of churches or governmental restraint on religious practice."[31]

It is submitted that the instant legislative program is a prime example of benevolent neutrality, without sponsorship and without interference, by means of which the State seeks to provide for a valid secular educational purpose by relying upon nonpublic institutions, whether church-oriented or otherwise, and at the same time permitting and assisting the parents of the children to continue to exercise their religious freedom in the choice of schools. It is precisely the sort of "accommodation of the Establishment and Free Exercise Clauses" which will prevent "the kind of involvement that would tip the balance toward government control of churches or governmental restraint on religious practice."

B. The Statute Does Not Create Excessive Involvement of Church and State.

Appellants, in their brief,[32] suggest that the purchase of secular education by the state from church-related schools creates the "excessive involvement" which was mentioned by the Court in *Walz*. However, if there is to be an accommodation, a balancing of the Religion Clauses, some in-

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[31] **Walz**, supra, p. 4348.

[32] Brief for Appellants, pp. 43, 44.

volvement is inevitable. The key word is "excessive". In the instant matter the state involvement is merely that supervision, including auditing, which is reasonably necessary to ensure that the service to be paid for has, in fact, been rendered. Since that service is the instruction of students in secular subjects, a matter in which the state already has the right to impose and enforce standards,[33] it can hardly be argued that payment for the secular service somehow enhances this necessary involvement to an excessive degree. The evil to be avoided is not payment for value received, but involvement; and the involvement, to be improper, must be excessive.

Appellants point to one provision of the statute which they deem "potentially ominous from this standpoint."[34] They refer to Sec. 5603(3) which reads as follows:

> " 'Secular subject' shall mean any course which is presented in the curricula of the public schools of the Commonwealth and shall not include any subject matter expressing religious teaching, or the morals or forms of worship of any sect."

The clause is a definition of "secular subjects" and describes just what it is that is being purchased by the Commonwealth. It makes clear that the Commonwealth is interested in securing instruction in secular matters, and not in religious and moral matters, which are properly the concern of others. Of course, it would be improper for teachers, under the pretext of teaching mathematics, science or lan-

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[33] **Allen,** supra, at pp. 245, 246. "Since **Pierce,** a substantial body of case law, has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training and cover prescribed subjects of instruction (cases cited). . . . These cases were a sensible corollary of **Pierce v. Society of Sisters:** if the state must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular educational function."

[34] Brief for Appellants, pp. 43, 44.

guage to substitute a course in religion or morals; and the state has the right to expect that this shall not be done; but to suggest, as do the appellants, that this requires the state to "police the classrooms" or to employ "undercover student agents",[35] is to indulge in a process of exaggeration which hardly befits a legislature bent upon reasonable accommodation of the secular needs and the spiritual needs of the students and their teachers. Whether or not abuses on the part of teachers will arise from time to time in the future, and what, in such event, the administrators of the Act might deem to be appropriate measures to deal with such cases, remain to be seen. Surely it is not necessary for this Court to assume that such abuses are inevitable or that the state would exceed the bounds[36] of reason in taking corrective measures. At any rate, should abuses occur, the state can decline to make payments, and, on the other hand, should state regulations be deemed excessive, the teachers or other persons affected may appeal to the Courts for an appropriate remedy.

A closely related idea, often asserted by this Court, is the principle that the state may not condition the distribution of welfare benefits upon the surrender of constitutional rights.[37] This concept, which lies at the heart of the Court's doctrine of "benevolent neutrality",[38] has never been acceptable to proponents of the "hostile and even unfriendly"

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[35] **Ibid.**, p. 44.

[36] Cf. **NAACP v. Alabama**, 377 U. S. 288 (1964), where the Court declared "A governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms". And see **Sherbert v. Verner**, 374 U. S. 398 (1963). See also **Griswold v. Connecticut**, 381 U. S. 479 (1965).

[37] See **Sherbert v. Verner**, supra; **Torcaso v. Watkins**, 367 U. S. 488 (1961); and **Frost v. Railroad Commission**, 271 U. S. 583 (1926).

[38] **Walz**, supra, at p. 4348.

theory of absolute separation. Nevertheless, this Court, while often permitting secondary effects which *advance* religion, has insisted that *inhibitions* of religion are forbidden unless they are essential to the accomplishment of a valid legislative purpose.

In the matter at hand, the state, in furtherance of the secular education of youth, may impose reasonable standards, and may guard against abuses by over-zealous religious teachers by appropriate regulations. But regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.

At this stage, however, when the question before the Court is the constitutionality of a statute, and not the question of abuse by either church or state in the application thereof, there is no need for judicial anticipation of problems which might arise in the future. Although the usual presumption in favor of the validity of legislative enactments will not prevent this Court from carefully scanning a statute alleged to affect vital freedoms, nevertheless, the legislative findings are not to be lightly set aside.[39] The scanning should be careful, but not hostile.

We are faced, in the matter of education, with an area of life in which the welfare of children requires the cooperation of three authorities: parents, state and church, each of which is vitally concerned, but none of which claims exclusive jurisdiction. Either they will coexist in peace and mutual respect, each performing its own role in the joint undertaking, or they will struggle for dominance. It is reasonable cooperation, not "absolute separation", which can and will result in mutual respect and peace. This is the common sense of the matter.

It is submitted that the Act of 1968, on its face, provides for reasonable standards of regulation, and does not create an excessive involvement of church and state in the proper affairs of the other.

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[39] Opinion of the Court below. 310 F. Supp. 35, at p. 45.

III. THE PUBLIC BENEFIT TO BE ACHIEVED.

Although the case at bar was disposed of on a Motion to Dismiss, and, consequently, no factual record was developed, nevertheless, the appellants, in their argument to this Court, have laid considerable stress upon certain allegations of fact, statistical and otherwise, mainly in an effort to bolster the idea that there is no public benefit to be achieved through the expenditure of public funds under the statute. *Ergo*, they reason, there being no secular legislative purpose, the payments are an illegal subsidy in support of religious purposes.

The Commonwealth, on the other hand, has indicated in the legislative findings,[40] that a very valuable benefit will accrue to the public in that the payments authorized in the statute will

—help to meet the financial crisis in elementary and secondary education, by

—helping the nonpublic schools to continue to bear a very large share (more than 20%) of the burden of educating the children of Pennsylvania,

—at a cost in public funds far less than that cost would be were the nonpublic schools, or a substantial portion of them, to cease to operate;

—and this will be done in a manner which will

—encourage the freedom of parents to choose their children's schools;

—prevent the chaos and impairment of education in the public schools which would result should the public schools be called upon to assume the intolerable added financial burden which the demise of nonpublic education would create.

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[40] 24 P. S. 5602.

The City of Philadelphia, your amicus, is particularly sensitive to these public benefits because such a large portion of that burden is borne by the nonpublic schools within its borders.

A. The Savings to the Taxpayers.

(1) *In Pennsylvania*

The fact and the size of this public benefit was recognized by the Supreme Court of Pennsylvania in a recent case[41] involving an attack upon the state legislation authorizing publicly funded busing for children attending nonpublic schools. The Court rejected the attack, which was similar to appellants' argument in the instant case, and upheld the law. In the course of its opinion the Court said:

> "The huge budgets required to maintain our public school system is a matter of concern to everybody. The imperative need for the best in education for the youth of our Commonwealth convinces the civic-minded citizens of the inevitability of heavy taxes to meet the expense, but it does not lessen the weight of the financial burden he must carry. Therefore, any procedure which may lighten that burden, consistent with maintaining the highest State educational standards, is warmly welcomed by the taxpayers. Thus, for every nonpublic school pupil picked up on the road by a public school bus, that much weight is lifted from the back of the taxpayer because the maintenance of nonpublic schools, of course, does not depend upon public funds."[42]

It is equally true that every child who receives instruction in the secular subjects covered by the statute, in a non-

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[41] **Rhoades v. Abington Township School District,** 424 Pa. 202 (1967).

[42] **Ibid,** p. 209.

public school, is thereby enabled to remain there for the entire curriculum, and the weight of the cost of that curriculum is lifted from the back of the taxpayer, since the reimbursable portion of the cost of those four subjects is but a small fraction of the total cost of educating a child in the public schools.

The Pennsylvania Court went on to indicate the size of the benefit:

> "Nearly one-fourth of the school children in Pennsylvania attend nonpublic (mostly denominational) schools. Since the parents of the children in nonpublic schools still pay public school taxes, without using public school facilities, it has been estimated that the taxpayers, since they are not required to provide teachers, equipment and supplies for the nonpublic schools children, are financially benefited to an amount equal to one-third of the entire educational budget of the Commonwealth.[43] Indeed, if nonpublic schools were to be abolished, the increase in tax burden to the citizens of the Commonwealth would be noteworthy and the Commonwealth would be hard put to provide the buildings, teachers and equipment for the flood of additional children released into their care and responsibility."[44]

(2) *In the Nation*

The same recognition of the substantial public benefit flowing from the continued existence of nonpublic schools is

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[43] General Fund Budget Message of Governor William W. Scranton, February 7, 1966 (b) 1966-1967 Budget of the Commonwealth of Pennsylvania, (c) "Current Expenditure Per Pupil, Average Daily Membership for Selected States", 1965-1966, Table 17, p. 20, Vol. 4, Selected Educational Statistics, Bureau of Statistics, Department of Public Instruction, Commonwealth of Pennsylvania (1966).

[44] **Rhoades,** supra, p. 210.

reflected in the recent Message to the Congress from President Richard M. Nixon, on March 3, 1970:[45]

> "Up to now, we have failed to consider the consequences of declining enrollments in *private* elementary and secondary schools, most of them church supported, which educate 11% of all pupils—close to six million school children. In the past two years, close to a thousand nonpublic elementary and secondary schools closed and most of their displaced students enrolled in local public schools.
>
> *"If most or all private schools were to close or turn public, the added burden on public funds by the end of the 1970's would exceed $4 billion per year in operations, with an estimated $5 billion more needed for facilities."*

Whereas, the proportion of the burden borne by nonpublic schools across the nation is 11%, the public share in Pennsylvania is more than 20%, and the proportion in Philadelphia and in many other urban and metropolitan areas is far higher.

A statistical analysis prepared by the Legal Department of the National Catholic Welfare Conference[46] sets forth the elementary and secondary school enrollment in the United States in 1960, by states, together with the number and ratio in the Catholic schools. The study indicated that an additional, non-Catholic, portion of the nonpublic school enrollment amounted to 10% of the Catholic figure. A few of the more significant figures are as follows:

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[45] Education Reform: The President's Message to the Congress Proposing a Series of Actions to Improve Elementary and Secondary Education. March 3, 1970; from Weekly Compilation of Presidential Documents, Vol. 6, No. 10, Monday, March 9, 1970, at p. 312.

[46] Georgetown Law Journal, Vol. 5, No. 2, Winter, 1961, p. 399, at pp. 443-4.

State	Total Enrollment	Catholic	Catholic ratio
Connecticut	573,331	84,416	14.72%
Delaware	102,604	18,544	18.04%
Illinois	2,274,666	484,506	21.30%
Massachusetts	1,072,240	234,414	21.90%
Minnesota	850,684	143,953	16.92%
New Hampshire	137,758	28,899	20.98%
New Jersey	1,370,894	287,717	20.99%
New York	3,606,894	751,722	20.84%
Ohio	2,349,326	362,249	15.42%
Pennsylvania	2,569,738	562,861	21.90%
Rhode Island	187,674	48,328	25.75%
Wisconsin	975,455	227,686	23.34%
United States	42,099,576	5,287,230	12.56%

By increasing the last two figures by 10% we find the estimated number of students in all nonpublic schools in 1960 was about 5,815,953 or 13.81% of the total. This compares to President Nixon's figures (supra) for 1970 of close to 6,000,000 or 11% and it is seen that the nonpublic share of the educational burden across the nation is substantial, but declining in proportion to the total.

(3) *In the Cities*

The concentration, in large urban areas, of persons preferring nonpublic schools has resulted in percentages far in excess of the national average.

Thus, the New York-Newark-Jersey City Standard Metropolitan Statistical Area (SMSA), in 1960, had 28% of its students in nonpublic schools; Chicago-Gary 32%; Philadelphia 34%; Detroit 21%; Boston 23%; Pittsburgh and St. Louis 29% each; Cleveland 29%; Minneapolis-St. Paul 27%; Cincinnatti and New Orleans 33% each; Milwaukee 37%.

Some of the smaller SMSA's had even higher percentages

of nonpublic school enrollment: Dubuque 69%; Green Bay 55%; Lewiston, Me. 51%; and Manchester, N. H. 49%.[47]

The problem facing Pennsylvania in the face of the threat of closing nonpublic schools is seen, then, to be a part of the national picture, and Philadelphia, with its high proportion of such schools is one of many large cities in the same boat. It is this situation, in which a large portion of the burden of educating the children of the Commonwealth is carried by nonpublic schools now threatened with closing due to financial pressures, which moved the Pennsylvania Legislature to enact the statute here under consideration.

(4) *In Philadelphia*

In Philadelphia, the nonpublic schools enroll 160,000 students, as compared to 280,000 in the public schools.[48] This is approximately 36% of the total school population, and represents 57% of the public school enrollment.

The mutual dependence of these two great systems, and the serious effect that financial failure of either would have upon the other, was expressed in a joint statement issued by the principal officers of the two systems on November 24, 1969, as follows:

> "The critical needs of all of Philadelphia's children have brought the Philadelphia Board of Education and the Archdiocesan Board of Education to a clear realiza-

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[47] The above figures are taken from the U. S. Bureau of the Census, 1960, Vol. 1, U. S. Summary, Part 1, as reported in an article by Robert J. Havighurst, "Social Functions of Catholic Education", a portion of a symposium entitled Catholic Education Today and Tomorrow, Nov. 1967, ed. Michael P. Sheridan, S. J. and Russell Shaw, National Catholic Education Assn., Wash., D. C., at pp. 10-11.

[48] See testimony of Dep. Superintendent of Schools Horowitz reported in Legislative History (Appellants' Brief, Addendum, p. 5 add). And see the Bulletin Almanac, 1970, p. 381, where the figures are: public schools 279,847; nonpublic (parochial 143,945 and private 15,674) a total of 159,619.

tion of the necessity to work for the joint solution of their common problems. The education of the children of Philadelphia depends upon the strength of two great educational systems—the public school system and the parochial school system. Each is essential to the welfare of the city and its children; each is fundamentally dependent upon the other. If one suffers, the other inevitably suffers.

"Both school systems face severe financial crises which will intensify in the days ahead. The financial failure of either system would seriously endanger the financial stability of the other, and this prospect must be avoided. The Archdiocesan Board of Education recognizes specifically the need for the Catholic community to be committed wholeheartedly to the financial support of public education. In turn, the Philadelphia Board of Education recognizes the need for governmental aid for the secular education of children in nonpublic schools.

"Is is, therefore, essential that the two systems work in close harmony, not only in the field of education, but also in the solution of their respective financial problems. To these ends, the two boards have agreed to work jointly to secure the city, state, and federal funding necessary to provide essential educational services for all the children of Philadelphia.

"To achieve these objectives, a joint committee of the two boards has been established."[48a]

If the nonpublic schools were to close, for financial or any other reasons, the burden placed on the public schools would be increased as much as 57%. In its current proposed operating budget for the school year commencing in

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[48a] Joint statement by Richardson Dilworth, President, Board (Philadelphia) of Education; William D. Valente, President, Archdiocesan Board of Education; Rt. Rev. Msgr. Edward T. Hughes, Superintendent, Archdiocesan Schools; Dr. Mark R. Shedd, Superintendent, Philadelphia Public Schools. November 24, 1969.

September, 1970, the Philadelphia School District proposes to spend for operating purposes (capital needs are not included) the sum of $314,115,000.[49] A 57% increase in this amount would result in an additional burden on the taxpayers in a sum in excess of 179 million dollars. This is the operating cost for one year and does not include capital expenditures which would be required to provide school buildings and other capital needs. What these would amount to is unknown. Their immensity, however, is suggested by the President's Message to the Congress, supra, in which President Nixon reported that, in the event of the loss of the nonpublic schools of the nation, the resulting capital cost would be in excess of the annual operating costs. (Five billion, as compared to four billion dollars.)

A report of the Pennsylvania Department of Education dated May, 1970, indicated payments made pursuant to the Act, during 1969-70, covering services rendered in the first year covered (1968-9), in a total amount of $4,875,534, paid to 1178 schools. Philadelphia's share, for 173 schools, was $1,058,473. Payments for the first year covered only 31% of actual claims, due to the limited funds available.

In a subsequent report, dated July, 1970, the Department indicated that it expected to pay for the second covered year (1969-70), for 1141 schools, a total sum of $19,480,015. Philadelphia's share, for 171 schools, was estimated at $4,115,978.

The comparative figures then are these: cost of educating 160,000 additional students transferring from nonpublic to public schools in Philadelphia, $179 million (*plus* capital expenditures); cost of preventing the transfer by purchase of services of nonpublic schools, $4.1 million dollars.

In the face of these figures, it is difficult to credit the opinion of one State official, cited by appellants in their brief,[50] to the effect that the Philadelphia public schools

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[49] Proposed Operating Budget of the School District of Philadelphia, Fiscal year beginning July 1, 1970, p. 1.

[50] Comment of Dr. B. Anton Hess, Commissioner of Basic Education, reported in Addendum to Appellants' Brief, p. 3 add.

could absorb the nonpublic school students "next September". The official stated that all such students "could be taught math, sciences and languages" by the public schools, but neglected to notice that closing of the nonpublic schools would impose, not merely the duty to teach those three subjects, but the burden of the entire secular curriculum; i.e., 179 million dollars, exclusive of capital expenditures!

Lest it be imagined that capital expenditures would be minimal due to the existence of unused space in the public schools, we call the Court's attention to the following excerpts from the School District Capital Budget:

"Further delay in the alleviation of acute overcrowding would be intolerable; . . .

"In the opinion of the staff, the Proposed Capital Budget and Program represents the absolute minimum level of expenditures necessary to provide the children of Philadelphia with a reasonably safe, functional and uncrowded environment for learning within this decade . . .

"Total enrollment (including preschool) still exceeds the total optimum capacity of existing permanent facilities by almost 30 percent. Half of the elementary schools and 70 percent of the secondary schools in Philadelphia are overcrowded now; enrollment in kindergarten through twelfth grade is expected to increase by nearly 30,000 students over the next ten years . . .

"The best that can be attempted in the current Program is to ameliorate the most desperate overcrowding according to a fair system of priorities. Thus while the long-range Plan for School Facilities requires the construction of 13 new high schools, 31 new middle schools, 34 new lower schools, and 26 school additions, only 65 of these 104 needed projects are funded in this Capital Program.

"Since the full need for school space cannot be met in permanent facilities for many years, several interim steps have been taken to obtain additional space, to use existing space more efficiently, and to mitigate the

effects of crowding in existing schools. These include the purchase and rental of school annexes; the program of busing-for-overcrowding at the elementary level, and the use of staggered-shift or 'dual-school' schedules in secondary schools . . ."[51]

If the present proposed capital budget represents the "absolute minimum", while "the best that can be attempted . . . is to ameliorate the most desperate overcrowding", and the full needs "cannot be met for many years"—the immense increase in both capital and operating expenses which would be precipitated by the closing of the nonpublic schools would be a catastrophe.

All of this heavy tax burden is in addition to the heavy cost of municipal services, including vast expenditures for health, welfare and police measures, which are essential to the survival of decent living conditions in metropolitan areas.

The taxing jurisdictions of the School District of Philadelphia and the City of Philadelphia municipal government are coterminous. Consequently both taxing authorities must rely on the same tax base for local tax revenues. The costs to provide municipal services have been increasing annually at a rate greater than the rate of increase in the revenues available to the City of Philadelphia. As a result, periodic increases in local taxes have been necessary. Projections of cost and revenue curves indicate that the revenue gap will continually widen and that the City of Philadelphia will have to impose tax increases with some degree of regularity. The imposition of a substantial tax increase by the School District of Philadelphia would drastically impair the ability of the City of Philadelphia to increase taxes to finance the provision of the municipal services for which it is responsible.

In view of the above, the legislative finding, that the removal of the nonpublic school children to the public

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[51] The School District of Philadelphia Proposed Capital Budget and Program—1971-1976, at pp. ii, iv and v.

schools would result in "an intolerable added financial burden to the public . . . as well as school stoppages and long term derangement and impairment of education in Pennsylvania"[52] is an understatement.

If this hazard can be substantially reduced by the expenditure of a tiny fraction of the sums which would otherwise be needed, the benefit to the public is so obvious that he who runs may read; and the suggestion of appellants that there is no public benefit to be realized, and consequently no secular legislative purpose to be achieved, from the expenditure of funds authorized by the statute, is untenable.

B. Freedom in Education—A Public Benefit.

In addition to the immense financial benefit to the public described above, the statute before the Court, if it is successful in its efforts to help the nonpublic schools avoid closing, will produce another public benefit, one of inestimable value to the community, though not capable of measurement in monetary terms. It will help to preserve freedom in the vital area of education.

The statute declares, in its legislative findings,

> "That freedom to choose nonpublic education, meeting reasonable State standards, for a child is a fundamental parental liberty and a basic right;"[53]

and this Court has expressed the same thought in the leading case of *Pierce v. Society of Sisters*, supra, when, in a unanimous decision, the Oregon statute which would have compelled attendance at public schools was struck down. In the words of the Court:

> "The fundamental theory of liberty upon which all governments in this Union repose excludes any gen-

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[52] Act of 1968, June 19, P. L. , No. 109, sec. 2(6); 24 P. S. 5602(6).

[53] Act of 1968, supra, at section 5602(4).

> eral power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[54]

This parental right is an important part of the inalienable right to liberty, with which all men are endowed by their Creator, and the protection of which constitutes the very reason for the existence of government. In the words of the Declaration:

> "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that amongst these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among men . . ."[55]

This is the cornerstone, in American law, upon which is founded the concept of benevolent neutrality, as opposed to absolute separation, which this Court has recognized as[56] the object to be achieved in the balancing of the sometimes conflicting demands of the two religion clauses in the First Amendment to the Constitution.

Whenever the state acts to protect the religious liberty of its citizens, the necessary, indeed, the desired, purpose is, not to make judgments concerning the respective merits of various religious doctrines or practices, but to permit the citizens to make such judgments; and to permit each citizen to act in accordance with his conscience, not with the guidance of the state, but aided by that liberty which it is the business of the state to protect.

Among the rights which constitute the broad idea of liberty, few are more precious,—to a parent, perhaps none

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[54] **Pierce,** supra, at p. 534, and see **Allen,** supra, where the Court reiterated the **Pierce** doctrine.

[55] Declaration of Independence, July 4, 1776, 1 Stat. 1.

[56] **Walz,** supra, at p. 4348.

are more precious—than the right to choose the teachers to whom he will entrust the formal education of his child.

There can be no more appropriate legislative purpose than the securing of the rights of the people; in its efforts to protect freedom to choose nonpublic education, the Pennsylvania legislature has served an eminently proper public purpose.

In addition to the fundamental protection of freedom, there are certain corollaries, which bring additional benefits to the public. These include the avoidance of monopoly and the preservation and encouragement of competition and diversity in education.

In a recent report entitled "The Disadvantaged Poor: Education and Employment",[57] the United States Chamber of Commerce Task Force on Economic Growth and Opportunity recommended government financial support for the education of all children, including support for private education as an alternative to public education. The Task Force based its recommendation upon the values of parental freedom of choice, the avoidance of governmental monopoly and the value of diversity and competition. Putting forth "the notion that government should not have a monopoly on publicly financed schooling", the Report said:

> "Lack of competition eliminates (the) ceaseless pressure for progress. And as a result, public schools are less vigorous than they could be.
>
> The second observation in support of our conclusion is based on the virtues of diversity. It is our conviction that no single collection of men, however competent and however dedicated, can exhaust the worthwhile possibilities in a given subject matter. Diverse groups, each pursuing institutional or personal self-interest or even selflessly working in a variety of intellectual climates, are more likely to produce divergent ideas than

[57] "The Disadvantaged Poor: Education and Employment" (1966); U. S. Chamber of Commerce Task Force on Economic Growth and Opportunity; U. S. Chamber of Commerce Catalogue No. 66-29037, pp. 63-69.

any monolith, no matter how tolerant. We take this diversity for granted in scholarship, in politics, and in the abundance and variety of the commercial marketplace. Why should we settle for the single choice in education?

And finally, a strong bias in favor of free choice and maximum satisfaction of individual preferences underlies our conclusion. As an intrinsic matter, we think it desirable that parents should have a choice of schools for their children. Educational philosophies differ. Different schools, none of them perfect, will have different combinations of strengths and weaknesses. Parents should be able to choose among them—Americans take their freedom for granted in planning college or university educations; relatively well-off Americans and members of some religious groups exercise the same choice for their children at the secondary-school level and sometimes before. Why should we settle for less for the great majority of Americans at the primary and secondary levels?"

The same regard for freedom, and its corollaries of competition and diversity, was reflected in the remarks of President Nixon in his report to the Congress[58] on the occasion of his establishment of the President's Commission on School Finance:

"The nonpublic elementary and secondary schools in the United States have long been an integral part of the nation's educational establishment-supplementing in an important way the main task of our public school system. The nonpublic schools provide a diversity which our educational system would otherwise lack. They also give a spur of competition to the public schools—through which educational innovations come, both systems benefit, and progress results.

Should any single school system—public or private—ever acquire a complete monopoly over the education

[58] Report to Congress, March 3, 1970, op. cit., at p. 312.

> of our children, the absence of competition would neither be good for that school system nor good for the country. The nonpublic schools also give parents the opportunity to send their children to a school of their own choice, and of their own religious denomination. They offer a wider range of possibilities for education experimentation and special opportunities for minorities, especially Spanish-speaking Americans and black Americans."

And, referring to the spiritual dimension often added by non-public schools, the President declared: "The government cannot be indifferent to the potential collapse of such schools." He then made the problem of the parochial schools a particular assignment of the Commission, and said:

> "In its deliberations I urge the Commission to keep two considerations in mind. First, our purpose here is not to aid religion in particular but to promote diversity in education; second, that nonpublic schools in America are closing at the rate of one a day."

It is submitted that the encouragement of freedom in education, with its concomitant values of competition and diversity, constitute a valid secular legislative purpose, and a benefit to the public of immense value. Standing alone, even without the tremendous financial saving to the taxpayer discussed *supra*, it would more than adequately justify the expenditures authorized by the Act of 1968.

C. The Program Will Aid the Cause of Racial Justice.

Appellants, in their many-pronged attack upon the Act, have thrown in the charge of racial segregation.[59] They do not allege any intention on the part of the nonpublic schools to exclude members of the negro race (Brief, p. 51) but

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[59] Standing to sue with respect to 14th Amendment charges was rejected by the court below, including the dissenting judge.

cite *de facto* segregation (Brief, pp. 8, 11) and then predict that a growth in nonpublic schools will result in two publicly supported systems, one poor and black, the other rich and white (Brief, pp. 9, 51).

It is interesting to note that, despite generally declining enrollment, the number of negro students in the Catholic schools of Philadelphia has increased during the past three years, and this despite the historical fact that the overwhelming majority of negroes in America have been Protestants.[60]

Appellants' argument is a peculiar one, for reason would suggest the opposite effect—not segregation, but integration, may be expected in the event nonpublic schools are not forced out of existence by economic pressures. *De jure* segregation springs from law or regulation, from the will of the rule giver. Whether he be an official of government or of an institution, it is his will which denies freedom and equality to persons by reason of race. *De jure* segregation should be struck down by contrary rules, enforced, where appropriate, by government, and by this Court. There is none here. *De facto* segregation springs from factors other than the will—primarily economic deprivation. It can be cured by measures which remove that deprivation. For, it is fundamental that scarcity produces higher cost, and cost reduces the power to choose, beginning with him who has the least. If the nonpublic schools are forced to close (and the trend is ominous), fewer parents will be able to exercise that precious freedom, so firmly vindicated by this Court in *Pierce;* tuitions, where they exist, will increase, and where they do not exist will be created; and in this choice, as in every choice which depends on cost, the poor will be the first to lose their freedom.

On the other hand, the preservation of freedom in education will enable more and more of the poor and the black (often the same persons) to choose the kind of schools

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[60] The Office of the Archdiocesan Superintendent of Schools reports negro enrollment in Catholic schools in Philadelphia as 1967: 15,099; 1968: 15,199; and 1969: 15,443.

which they prefer, but, which, in the absence of low cost nonpublic schools, they cannot afford. In this regard, it should be noted that both the Chamber of Commerce and President Nixon, in their reports discussed *supra*, considered the preservation of nonpublic schools as an advantage, *especially* to the poor and disadvantaged.

In addition, the avoidance of the intolerable tax burden which would strike the communities, especially the large metropolitan areas, will go far to permit the continuation of costly municipal programs of health and welfare whose principal beneficiaries are the poor and disadvantaged.

Absolute separation is a move towards state monopoly control over the education of all but the few whose purses are fat enough to afford them a defense. It may produce integration, but it will not produce freedom.

The Pennsylvania statute is a move toward freedom, for the rich and for the poor, for the white and for the black. It should be upheld.

CONCLUSION.

It is submitted that a most careful examination of the Pennsylvania Nonpublic Elementary and Secondary Education Act, not only on its face, but also in the light of its legislative history, reveals a valid exercise of legislative power, which is directed to a proper public purpose, the primary effect of which neither advances nor inhibits religion, and which does not create an excessive involvement of church and state. Accordingly, the decision of the court below should be affirmed.

Respectfully submitted,

JAMES L. J. PIÉ,
Deputy City Solicitor,
and
LEVY ANDERSON,
City Solicitor,
Attorneys for City of Philadelphia,
Amicus Curiae.

Appendix

(Seal)

CITY OF PHILADELPHIA

JAMES H. J. TATE
Mayor

July 14, 1970.

Mr. William D. Valente,
President,
The Board of Education,
Archdiocese of Philadelphia,
310 North Nineteenth Street,
Philadelphia, Pennsylvania 19103.

Dear Bill:

Thank you for your letter with respect to the test case before the Supreme Court of the United States, challenging the validity of the Pennsylvania Nonpublic Elementary and Secondary Education Act under the federal constitution.

I do share, of course, your concern to assure the success of our litigation, not only from a personal standpoint, but also because its outcome has a direct bearing upon the hard-pressed urban school systems.

Inasmuch as the City of Philadelphia indeed set the pattern and provided much of the support and drive for this legislation, I would be delighted to join the proponents of the legislation by filing a brief amicus for the City of Philadelphia.

I have instructed the City Solicitor, Levy Anderson, Esquire, and his Deputy, James L. Pié to proceed immediately on this matter.

With all good wishes and kindest personal regards, I remain

Sincerely yours,
JAMES H. J. TATE,
Mayor.

JHJT:zlg